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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~1010~~ 150

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEVER, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT, *Appellants, Appellants,*

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG, AND BOROUGH OF RED HILL, *Appellees.*

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JURISDICTIONAL STATEMENT

Appellants appeal from an order of the Supreme Court of Pennsylvania dismissing their complaint and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania, printed as Appendix A, is not yet reported.

JURISDICTION

This suit was brought to enjoin the Appellees from going ahead with a proposed sewer construction program. The Order of the Supreme Court of Pennsyl-

vania was entered on April 26, 1960. Petition for Reargument was denied on May 26, 1960. Notice of appeal was filed in that Court on June 3, 1960. The jurisdiction of the Supreme Court of the United States to review this order of the Supreme Court of Pennsylvania is conferred by Section 1257 (2) and 2101 Title 28, United States Code. It is believed that the following decisions sustain the jurisdiction of the Supreme Court to review the order:

> *Windsor* v. *McVeigh*, 93 U.S. 274; *Pennoyer* v. *Neff*, 95 U.S. 714; *Scott* v. *McNeal*, 154 U.S. 34; *Louisville & Nashville R.R. Co.* v. *Schmidt*, 177 U.S. 230; *Simon* v. *Craft*, 182 U.S. 427; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413; *Nashville, Chattanooga & St. Louis Railway* v. *Walters, Commissioner of Highways*, 294 U.S. 405; *Atchison, Topeka & Santa Fe Railway Co.* v. *Public Utilities Commission of California*, 346 U.S. 346.

STATUTE INVOLVED

On May 1, 1958, the Upper [redacted]nery Joint Authority was created by the Boroughs of East Greenville, Pennsburg, and Red Hill pursuant to the Pennsylvania Municipal Authority Act of May 2, 1945, P.L. 382, as amended and supplemented, 53 Purdon's Penna. Statutes Annotated Section 301 et seq. The Act contains no provision for a public hearing prior to the authorization and issuance of bonds by the Authority. Pertinent portions of the Act relating to bonds are set out at Appendix E.

QUESTIONS PRESENTED

1. When three Philadelphia suburbs in which the average annual income is $3,800 create a Joint Authority that arbitrarily and capriciously insists upon con-

structing a sewer system to cost $2,500,000 involving an initial assessment of approximately $1,000 and an annual rental of approximately $69 per dwelling unit, and arbitrarily and capriciously refuses to call a public hearing at which reputable consulting engineers retained by Appellants at their own expense can establish that in many important respects the proposed sewage system is defective and should cost $1,500,000 or one million less, does their arbitrary and capricious refusal so to do, abridge the privileges and immunities of Appellants as citizens of the United States, deprive them of the equal protection of the laws, due process of law and take their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. When the Supreme Court of Pennsylvania upon demurrer dismisses *without a hearing before the Court of Common Pleas* of Appellants' complaint that alleges the above facts, and refuses to enjoin the proposed inefficient and expensive sewer system, does the Court thereby abridge the privileges and immunities of Appellants as citizens of the United States, deprive them of the equal protection of the Laws, due process of law and take their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Does the Pennsylvania Municipal Authority Act (P.L. 382, May 2, 1945) pursuant to which Appellee Upper Montgomery Joint Authority was created by the three Appellee suburbs, violate the Fourteenth Amendment to the United States Constitution in that it makes no provision for hearings of taxpayers before the Authority assumes bonded indebtedness and no provision for judicial review of actions of the said Authority?

STATEMENT

The Boroughs of East Greenville, Pennsburg and Red Hill (hereinafter called the three suburbs) are suburbs of the City of Philadelphia.

Approximately 4,800 people live there of whom some 600 are retired on Social Security or are widows living on pensions. The average yearly income of a property owner is $3,800 per year. (Complaint, Appendix, Par. 14 (f) and Appendix D).

In October of 1946 the Pennsylvania Sanitary Water Board ordered the three suburbs to stop discharging their sewage into the waters of the Commonwealth and in 1947 they engaged Albright and Friel, Inc., a firm of consulting engineers who reported a sewage system, designed to serve 1,259 families and 4,000 people, would cost $763,000 but advised against it, because of its high cost. (Complaint, Pars. 9, 10, 11 and 13, Appendix C).

Time passed and in 1958 Appellees again engaged Albright and Friel, Inc., who submitted a new plan for a sewage system designed to serve 1,463 connections, to cost $1,950,000 with an annual rental of $49.95 (Complaint, Par. 12, Appendix C).

In 1958, the three suburbs created Upper Montgomery Joint Authority* (hereinafter called the Joint Authority) and, thereafter, under date of 25 January, 1960 Albright and Friel, Inc. submitted a third sewage plan, designed to serve 6,000 people and 1,534 dwelling units. By identical ordinances on 8 February, 1960, the three suburbs approved this plan to cost $2,500,000

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* Pursuant to the Pennsylvania Municipal Authority Act of May 2, 1945, P.L. 382 as amended and supplemented 53 P.S. Section 301 et seq.

with an annual rental of $69.40 and an immediate charge of approximately $866,264 of the aggregate cost against properties benefited according to the foot front rule (Complaint, Pars. 7, 8, and 13, Appendix C).

On March 7, 1960, the three suburbs entered into a contract with the Authority to build the sewer system planned by Albright and Friel (Complaint, Par. 6, Appendix C).

At their own expense Appellants engaged Messrs. Tumarkin, Morgan and Emerman, a firm of consulting engineers of excellent repute (Complaint, Par. 14, Appendix C and Exhibit C annexed to the Petition for Reargument, Appendix D) to study the sewage system planned by Albright and Friel, Inc. Their study reveals that the proposed sewer system is defective in the following particulars:

1. *It is not economically feasible;*

2. *It is not a complete sewer system for each of the three suburbs;*

3. *It will only partially abate the discharge of sewage into the waters of the Commonwealth;*

4. *For the benefit of a relatively few persons whose sewage may have been polluting the waters of the Commonwealth, its construction and financing will place an unnecessary and unjustifiable burden upon the majority of the taxpayers and property owners;*

5. *It proposes construction of a third pumping station, three years hence, that will require additional sewer systems, pumping equipment, interceptor sewers and force mains that are not economically*

feasible now and which will not be three years hence;

6. *It will require an initial assessment of $1,000 against each property owner and an annual sewer rental of $69.40 per dwelling unit, an unjustifiable hardship when the average yearly income is but $3,800 per year and of the 4,000 persons who would use the project 600 are retired on Social Security or are widows living on pensions. (Complaint, Par. 14 (a), (b), (c), (d), (e) and (f), Appendix C and Exhibit C annexed to the Petition for Reargument, Appendix D).*

Moreover, on February 5, 1960 at an informal public meeting (not a "*hearing*" within the meaning of procedural due process) in Pennsburg, Albright and Friel, Inc., explained that their 1960 sewage plan was designed to serve 6,000 people at a cost of about $2,500,000 whereas their 1947 sewage plan costing $763,000 had been designed to serve only 3,000 people. This was said to involve a 30% increase in use over the 1947 system. If this "were the only factor involved" then the estimated cost of the 1960 sewer system "should have increased from the quoted figure of $763,000 in 1947 to approximately $991,000." (Complaint, Par. 13, Appendix C).

To understate the matter, the Appellees' consulting engineers, Albright and Friel, Inc., not only did not satisfactorily explain why the cost of their 1960 system so greatly exceeded the costs of their 1947 and 1958 systems, but Appellants were not permitted to show that the cost of the 1960 system is grossly exorbitant.

When the Appellants sought to bring these matters to the attention of the Appellees, to point out discrep-

ancies between the cost estimates of Albright and Friel, Inc., for the present construction and their cost estimates of previous plans, to obtain consideration of other preferable and less expensive alternatives Appellees "insisted that all investigation be put aside and that the sewer system as proposed in the Albright and Friel, Inc.. Report of January 25, 1960, be immediately and arbitrarily approved". (Complaint, Par. 15, Appendix C).

Appellees even went to the extent of writing threatening letters to Appellants and other taxpayers warning them "if they should proceed with legal action," the Appellees "would hold them individually and jointly responsible in substantial money damages." (Complaint, Par. 15, Appendix D).

Alleging these actions of Appellees were arbitrary and capricious, Appellants asked the Court of Common Pleas to enjoin them from proceeding. (Complaint, Pars. 17, 18 and Prayers for Relief).

Thereafter, the Appellees filed a petition in the Supreme Court of Pennsylvania asking it to take original jurisdiction. That Court did so and removed the case from the Court of Common Pleas where the complaint had been filed.

In an opinion filed April 26, 1960, the Supreme Court of Pennsylvania dismissed the Complaint (Appendix A and C). Since the Appellees demurred to the complaint, this decision by the Supreme Court of Pennsylvania is made on the basis that *all the allegations in the complaint are true.*

In other words the Court said that, even if the Appellants were able to establish all the factual allegations in the complaint and prove that the proposed sewer

system was defective in the particulars alleged and was costing more than it should, Appellants were not entitled to any *hearing* on their complaint.

After summarizing the above allegations, Judge B. R. Jones, speaking for the Supreme Court of Pennsylvania said:

> "The instant matter is presented upon the pleading, i.e., the complaint and the preliminary objections thereto in the nature of a demurrer. In passing upon the validity of these preliminary objections certain well-established principles are applicable: (1) preliminary objections admit as true only such facts as are well pleaded, material and relevant and only such inferences as are reasonably deducible from such facts; . . . (2) preliminary objections admit neither conclusions of law nor inferences unwarranted by the admitted facts nor argumentative allegations nor expressions of opinion; . . . (3) if to sustain the preliminary objections of a defendant will result in a denial of a plaintiff's claim or a dismissal of plaintiff's suit, such preliminary objections will be sustained only in those cases which are clear and free from any doubt:
>
> Does this complaint present a justifiable cause of action? Our analysis of its allegations indicates that it does not. With one exception, infra, the property owners' accusations are generalities and conclusions unsupported by factual averments. Allegations that the proposed sewer plan is economically not feasible, incomplete and will result in the imposition of an unnecessary and unjustifiable burden on the property owners in the triborough area find no support in the facts averred in this complaint. Assuming the truth of all the well pleaded, material and relevant facts and inferences reasonably deductible therefrom, such facts and inferences do not establish any such abuse

of discretion or arbitrary and capricious action on the part of these municipal officials such as warrants judicial interference. *Nowhere in the proceeding is there any allegation of any fraud or misconduct on the part of these municipal officials.*

The thrust of the property owners' accusations is that the Authority's consulting engineers estimated the cost of the proposed construction in 1946 at $763,000 whereas the same engineers, in 1960, estimated the cost of the proposed construction at $2,592,000. However, taking into consideration the larger number of dwelling units to be serviced, the tremendous and unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors, the increase in the estimated costs of this project between 1946 and 1960 does not, standing alone, justify our interposition in this matter.

The property owners want a hearing. Even if such hearing were held and *all* the facts *alleged* in the complaint were *proven*, judicial interference would be unwarranted. The legislature has vested in both the Authority and the Borough officials the power and responsibility of conducting governmental affairs in their respective areas: to such officials on the local level is given the right to exercise both judgment and discretion within the sphere of the legislative grant. Courts should be loath to interfere with or control the performance of the duties of such municipal officials: fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials alone justify judicial intervention.

We have long recognized a presumption that municipal officers properly act for the public good.

Presumptively, these officials must be regarded as acting properly and for the public good. Absent any allegations in this complaint of either

fraud or misconduct and absent any allegations of fact which would indicate that these municipal officials have acted or are acting either in abuse of their power or in a capricious or arbitrary manner, judicial intervention cannot be justified. To label the actions of these officials as capricious or arbitrary does not make them so. *A hearing might indicate that the proposed plan is not as complete as it might be, that it involves a greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan.* However, the determination of such facts has been placed in the first instance in the discretion and judgment of the Authority and Borough officials and upon them has been placed responsibility under the law for such determination and judgment. Unless it can be shown—and the facts alleged in the complaint, even if proven, do not so show—that the discretion and judgment of such officials have been motivated by fraud or by complete lack of responsibility or by arbitrary considerations or capricious beliefs, no court should substitute its judgment for that of such officials. To do so would constitute an unwarranted judicial interference with the duties of duly appointed and elected public officials.

Even if the property owners proved all the facts set forth in their complaint, as distinguished from the conclusions of law, such facts do not show such conduct on the part of the municipal officials as to justify our interference with their discretion and judgment.

In view of the conclusion which we have reached, it is unnecessary to consider the question whether the property owners are guilty of laches under the circumstances.

The preliminary objections are sustained and the complaint dismissed with prejudice at plaintiffs' costs.' (Emphasis supplied)

After this decision by the Supreme Court of Pennsylvania, the Appellants petitioned for reargument and suggested that the Court had misapprehended the significance of the above-mentioned factual allegations in the complaint, especially paragraphs 14, 15, 16 and 17 summarized *supra* (See the Complaint, Appendix C)

To their Petition for reargument, Appellants annexed an opinion letter from their consulting engineers, Messrs. Tumarkin, Morgan and Emerman, dated 31 March 1960 (Appendix C) which points out that the proposed sewer system is further defective, in that:

(a) *The decision of Appellees "to install two sets of sewers in alleys parallel to and in lieu of one sewer in Main Street aggravates the present situation," increases the cost and is "further proof that this project is not economically feasible." It doubles the "linear feet of pipe required."*

(b) *"The drawings do not indicate that test pits and/or borings were taken along the center line of the proposed sewer."*

(c) *The plans and report of Albright and Friel, Inc., indicate there are approximately 120,000 linear feet of sewer pipe and a primary and secondary treatment plant, designed for 6,000 people. Under today's high prices not including rock excavation, the average cost for this sewer system is $50,000 per mile plus $300,000 for the cost of one primary and secondary sewage treatment plant, including interceptor sewers, and the cost of the overall sewer system with two pumping stations should be approximately $1,500,000."*

(d) *And "of the 1,800 persons who would use the project, 600 are retired on Social Security or are widows living on pensions and can ill afford to pay for their share of this expensive project."*

(e) *Albright and Friel, Inc.'s proposed sanitary sewer system "is not a complete system for each Borough" and there are "homes and other buildings that will not connect to the proposed sewers. Taxpayers not abutting on the sewer lines can dispose of their sewage cheaply.*

(f) *Since neither taxpayers who do not abut on the sewer lines nor the schools, which have their own sewage disposal system "are not included for connection," the Appellees are deprived of large sewer rentals and the abutting taxpayers are thus obliged to carry an unfair percentage of the total cost.*

(g) *212 homes in the three suburbs and the surrounding watershed area will not be connected to Albright and Friel, Inc.'s proposed sewage system and this means that "sewage disposal into the waters of the commonwealth will only be partially abated." Therefore, "over 16% of the homes, which may be polluting the watershed streams, will not be connected and therefore would not be abating and possibly continuing the nuisance."*

(h) *Under Albright and Friel, Inc.'s proposed sewage plan, the majority of the taxpayers who abut the new sewer lines will be paying for a sewer system required to abate a nuisance created by a minority of taxpayers abutting existing sewers.*

(i) *"Economy, at present can best be realized by considering a design for 6,000 people for twenty years with two small disposal plants and one pumping station."*

(j) *The fearful burden of taxation threatening these three suburbs by the $2,500,000 cost of Albright and Friel, Inc.'s proposed sewage system can be eased by the use of "settling tanks, cesspools and for septic tanks, etc. for isolated houses and farms," thereby reducing the linear feet of pipe required.*

Despite this more detailed showing in the Petition for Reargument, and despite specific allegations therein, that (a) the refusal of Appellees to give Appellants a hearing at which Messrs. Tumarkin, Morgan and Emerman could present their findings; (b) the refusal of the Supreme Court of Pennsylvania to grant such a hearing before the Court of Common Pleas; and (c) the failure of the Pennsylvania Municipal Corporation Act (PL. 382, May 2, 1945), under which the Joint Authority was organized, to provide for hearings before the Authority or judicial review of the Authority's actions, abridged the privileges and immunities of Appellants as citizens of the United States, deprived them of due process of law and took their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, the Supreme Court of Pennsylvania on May 26, 1960, denied Appellants' Petition for Reargument.

THE QUESTIONS ARE SUBSTANTIAL

When a property owner's average annual income is but $3,800, to assess him $1,000 and inflict upon him an annual rental of $69.40 is cruel.

The $1,000 assessment is almost one third his annual income.

Moreover, of the 4,800 persons this sewage district is to serve, 600 are retired living on Social Security or widows living on pensions.

If this costly sewage district is built many of these people are bound to lose their homes.

The Appellants at their own expense have retained consulting engineers who say that there are basic defects in the proposed sewage district and the sewage district proposed can be built for $1,500,000 instead of the $2,500,000 that Appellants propose to spend. This is a saving of about one million dollars.

Yet, as we have seen, not only the Appellees, but also the Supreme Court of Pennsylvania refuse to give the Appellants a hearing at which their consulting engineers may testify in detail to substantiate the allegations in the complaint (Appendix C) and in their opinion letter of 31 March, 1960 (Appendix D).

To prevent their suing to enjoin this inefficient and expensive sewage district Appellees even went to the length of threatening taxpayers who exercised their legal right to sue. Annexed as Appendix B is a sample of the intimidating letter sent to complaining taxpayers.

In this Court it is quite immaterial whether what Appellants allege be true. We do not ask this Court and we did not ask either Appellees or the Supreme

Court of Pennsylvania to accept as true what the Complaint (Appendix C) alleges or what the opinion letter of our consulting engineers (Appendix D) sets forth.

What we do say is that Appellant taxpayers are entitled to be heard. Fairness requires that the Supreme Court of Pennsylvania allow the Appellants to prove, if they can, the allegations of their complaint.

On the authority of Statements by Mr. Justice Field in *Windsor* v. *McVeigh*, 93 U.S. 274, the Supreme Court of Pennsylvania, long ago, itself, said:

> "No man, in this state, can be deprived of his property except by a proceeding judicial in its nature, and as such involving as an indispensable requisite an opportunity of being heard." (*Scheibner* v. *Baer* (1896), 174 Pa. State 482, 34 A. 193 at 194) See also: *Watts, Watts and Company Limited* v. *Unione Austriaca Di Navigazione* (1918), 248 U. S. 9 at pp. 21-22.

In *Postal Telegraph Cable Company* v. *City of Newport, Kentucky* (1917), 247 U.S. 464, Mr. Justice Pitney put the point this way:

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

Thus, the Supreme Court of Pennsylvania has denied Appellants their constitutional right to be heard by the Appellees and the Court of Common Pleas.

This entitles them to appeal to this court.

The problem does not differ in principle from *Nashville, Chattanooga and St. Louis Railway* v. *Walters, Commissioner of Highways* (1935), 294 U.S. 405.

Just as here Appellants do not question the right of the Appellees to construct a sewage system so the Railway there, did not question the right of the Tennessee State Highway Commission to compel it to eliminate grade crossings. However, unlike our case the Railway there, conceded that $17,400 was a reasonable cost for the elimination of the particular crossing in question. Also, unlike our case, the trial court took over 492 printed pages of testimony and held that an order of the Highway Commission imposing one half the cost of eliminating the grade crossing upon the Railway, was arbitrary, unreasonable and void. Upon appeal, the Supreme Court of the State reversed the decree of the Trial Court and ordered the bill of complaint dismissed.

In so doing the Supreme Court of Tennessee there, acted the way the Supreme Court of Pennsylvania has acted here in dismissing the complaint of Appellants. It

> "declined to consider the special facts relied upon as showing that the order and the statute as applied were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings." (p. 414)

Holding first, that facts were alleged showing that the action of the Highway Commission was arbitrary and unreasonable and second, that the Supreme Court of Tennessee erred in not giving them consideration, Mr. Justice Brandeis, speaking for a unanimous court reversed the order dismissing the bill of complaint, saying:

> "Third. We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the state court to hold that the statute and order complained of are abitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. Moreover, since that court held the facts relied upon to be without legal significance, it did not enquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State.
>
> Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight. We have also no occasion to consider whether the Railway should bear a proportion of the cost of the underpass less than one-half."
>
> "The judgment of the Supreme Court of Tennessee is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion."

Just as in *Nashville, Chattanooga and St. Louis Railway* v. *Walters, Commissioner of Highways*, the Supreme Court of Pennsylvania here, refuses to con-

sider the allegations in Appellants' complaint and dismisses it without any hearing at all.

Because the demurrer admits the truth of the allegations in the complaint, it follows that the Appellants are to have their property taken without just compensation.

As this Court said in *Atchison, Topeka and Santa Fe Railway Co.* v. *Public Utilities Commission of California* (1953) 346 U.S. 346 when a State Commission makes arbitrary and capricious orders it:

> "must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. Section 1257 (2). . . . The Appellants presented squarely to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, *and the cases are properly here on appeal.*" (pp. 348-349)

Of course, in the Nashville case *supra*, the Trial Court took testimony and in the *Atchison, Topeka and Santa Fe* case, the Public Utilities Commission of California had held hearings at which the Railways were able to offer evidence in support of the allegations of their complaint. In our case not only the Joint Authority and its three suburbs but also the Supreme Court of Pennsylvania refuses Appellants an opportunity to call Messrs. Tumarkin, Morgan and Emerman, their reputable consulting engineers, to a

hearing at which they can offer evidence in support of the allegations in their complaint.

A fortiori in a case such as ours this Court has jurisdiction of this Appeal and a substantial question is presented for decision.

The right Appellants ask the Court to protect is more than substantial. It is the most precious right Americans have—their Day in Court before the State of Pennsylvania acting arbitrarily and capriciously through Appellees takes their property without just compensation.

Perhaps, the grandest case at the October, 1959 Term or any Term was Docket 59, *Sam Thompson* v. *City of Louisville*. There, the Court reached down to the City of Louisville to reverse the unjust conviction of Shufflin' Sam Thompson for loitering and disorderly conduct at the Liberty End Cafe. Sam was charged with dancing by himself and not eating and not drinking when as a matter of fact he was "eating a dish of macaroni" and drinking "a glass of beer" and with the proprietor's permission "shuffling his feet in rhythm with the music of the juke box." Reversing Sam's conviction on both charges and remitting his $10 fine for each, Mr. Justice Black, for a unanimous Court, held "the charges were so totally devoid of evidentiary support as to render Sam's conviction unconstitutional under the due Process Clause of the Fourteenth Amendment", and he said:

> "Just as 'Conviction upon a charge not made would be sheer denial of due process' so is it a violation of due process to convict and punish a man without evidence of his guilt."

CONCLUSION

As tragic, if not more tragic, to Suburbia U.S.A. would be to allow the Appellees arbitrarily and capriciously to tax for an inefficient and needlessly expensive sewage system.

As we have seen, some 600 of the residents are retired living on Social Security or widows living on pensions. The 4200 other residents for the most part are young people of America—ex G.I.'s from World War II, beginning married life and raising their children in the suburbs.

To these individuals whose annual income averages but $3,800., an unnecessary assessment of $1,000. with annual charges of $69.40 is a family catastrophe. It could mean the loss of their homes.

When public-spirited citizens, such as Appellants, at their own expense, retain a consulting engineering firm of good repute, which after study, finds important defects in the plan and concludes its cost should be $1,500,000. or one million less than the estimated $2,500,000., the least that Appellees and the Supreme Court of Pennsylvania can do, is to hear them.

Not only for the protection of Appellants and the others who dwell in these three Philadelphia suburbs, but for the protection of Suburbia U.S.A. the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

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APPENDIX A

[110]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 46
Miscellaneous Docket No. 12
Original Jurisdiction

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., MAR-PETH LAND CO., INC., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEBER, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT,

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG AND BOROUGH OF RED HILL

Opinion of the Court

JONES, B. R., J. FILED: April 26, 1960

On March 21, 1960, thirteen owners of realty in the Boroughs of East Greenville, Pennsburg and Red Hill, Montgomery County, instituted an equity action in the Court of Common Pleas of Montgomery County against the aforesaid Boroughs and the Upper Montgomery Joint Authority[1] to restrain them, jointly and severally, from proceeding with a contemplated construction and financing of a sewage collection system, a sewage treatment plant and other related sewer facilities "in and adjacent to and for rendering service in and for" the said Boroughs.

[1] This Authority was created by the three Boroughs under the provisions of the Pennsylvania Municipal Authority Act of May 2, 1945, P. L. 382, as amended and supplemented, 53 P. S. § 301 et seq.

[110-2] On March 31, 1960 the Authority and three Boroughs filed preliminary objections in the nature of a demurrer to the property owners' complaint.

On the same date the Authority and three Boroughs filed a petition in this Court requesting that we take original jurisdiction of the proceeding. Upon answer being filed to that petition, on April 4, 1960, in view of the importance of the questions involved, we directed the issuance of a special certiorari to the Court of Common Pleas of Montgomery County removing therefrom the record and all papers in the proceedings to this Court "for consideration and action thereon as if said case were [before this Court] on original jurisdiction".[2] Such is the present posture of this litigation.

The instant matter is presented upon the pleadings, i.e., the complaint and the preliminary objections thereto in the nature of a demurrer. In passing upon the validity of these preliminary objections certain well-established principles are applicable: (1) preliminary objections admit as true only such facts as are well pleaded, material and relevant and only such inferences as are reasonably deducible from such facts: *Adams* v. *Speckman*, 385 Pa. 308, 122 A. 2d 685; *Gardner* v. *Allegheny County*, 382 Pa. 88, 114 A. 2d 491; *Byers* v. *Ward*, 368 Pa. 416, 84 A. 2d 307;

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[2] Article V, Section 3, of the Pennsylvania Constitution vests in this Court "original jurisdiction in cases of injunction where a corporation is a party defendant" and such jurisdiction extends to corporations municipal in nature: *Wheeling* v. *Philadelphia*, 77 Pa. 238; *DeWalt* v. *Bartley*, 146 Pa. 525, 23 A. 448; *Bruce* v. *Pittsburgh*, 161 Pa. 517, 29 A. 584; *Hoffman* v. *Pittsburgh*, 229 Pa. 36, 78 A. 26; Raff v. Philadelphia, 256 Pa. 312, 100 A. 815; *Wentz* v. *Philadelphia et al.*, 301 Pa. 261, 151 A. 883; *Mistick* v. *Cammack*, 397 Pa. 296, 154 A. 2d 588. The acceptance of such jurisdiction is a matter solely discretionary with this Court: *Clark* v. *Washington Borough*, 145 Pa. 566, 23 A. 333; *Wentz* v. *Philadelphia*, supra; *Commonwealth ex rel. Paylor* v. *Claudy*, 366 Pa. 282, 77 A. 2d 350; *Mistick* v. *Cammack*, supra.

(2) pre- [110-3] liminary objections admit neither conclusions of law nor inferences unwarranted by the admitted facts nor argumentative allegations nor expressions of opinion: *Adams* v. *Speckman*, supra; *Detweiler* v. *Hatfield Joint School District*, 376 Pa. 555, 104 A. 2d 110; *Byers* v. *Ward*, supra; *Kaufman* v. *Kaufman*, 222 Pa. 58, 70 A. 956; (3) if to sustain the preliminary objections of a defendant will result in a denial of a plaintiff's claim or a dismissal of plaintiff's suit, such preliminary objections will be sustained only in those cases which are clear and free from any doubt: *Adams* v. *Speckman*, supra; *Sun Ray Drug Co.* v. *Lawler*, 366 Pa. 571, 79 A. 2d 262; *Davis* v. *Investment Land Co.*, 296 Pa. 449, 146 A. 119.

The complaint of the realty owners contains 18 paragraphs. Paragraphs 1 to 5, inclusive, describe the plaintiff property owners and the corporate defendants. Paragraph 6 avers that the three Boroughs on March 7, 1960, by ordinances simultaneously adopted, approved an agreement entered into on March 3, 1960 by the three Boroughs with the Authority for the construction of a sanitary sewage collection system, a sewage treatment plant and other related sewer facilities in said Boroughs. Under this agreement the Authority was to effect the construction of this project and the three Boroughs were to ensure that abutting property owners would connect with the sewer system and would grant certain easements and rights of way to the Authority. Paragraph 7 recites that, prior to the adoption of these ordinances, the three Boroughs, simultaneously on February 8, 1960, adopted certain ordinances. These ordinances approved the Authority's plan of construction,[3] approved the estimated cost of said sewer facilities assessable in each of the three Boroughs and [110-4] the aggregate estimated cost of the entire system

[3] A plan dated January 25, 1960 which had been prepared and submitted to the Authority by a certain named firm of consulting engineers.

and, further, approved the Authority's proposal to charge approximately $886,264 of the total aggregate cost against properties benefited, improved and accomodated thereby, said assessment to be in accordance with the foot front rule. Paragraph 8 avers that the Authority's engineers' report described the proposed sewer system as designed to serve 1534 presently existing dwelling units and projected a total estimated cost for the construction and financing of said sewer facilities at $2,592,000 and an estimated average annual sewer rental per dwelling unit of $69.40.

Paragraphs 9 to 12, inclusive, set forth a history of the events which preceded the adoption of the Boroughs' ordinances. The three Boroughs on February 24, *1947* had engaged the same firm of consulting engineers to make a preliminary survey and study of the collection and disposal of sewage from the tri-borough area and such written survey and study was prepared and submitted to the three Boroughs on July 9, 1947. This survey and study estimated a total cost of $763,000 for the construction of the sewer facilities to serve 1259 then existing dwelling units at an average annual rental per dwelling unit of $39.40 and said survey and study suggested that, in view of the then high construction costs, it was inadvisable at that time to proceed with the construction of the sewer facilities. Eleven years later—1958—the three Boroughs received from the same firm of consulting engineers another estimated cost of the construction and financing of sewer facilities to serve 1463 then existing dwelling units at $1,950,000 at a average annual rental per dwelling unit of $49.95.

Paragraph 13 sets forth that, on February 5, 1960 at a [110-5] public meeting, a representative of the same firm of consulting engineers explained that the discrepancy between its estimates of construction and financing costs in 1947 and in 1960 was due to the fact that the system proposed in 1947 was designed for an ultimate 5000 dwelling

units, while the system proposed in 1960 envisioned an ultimate 6000 dwelling units.

Paragraph 14 avers that the property owners then engaged their own consulting engineers. These engineers have advised that the Authority's proposed sewer system (a) is not economically feasible, (b) does not propose a complete sewer system and (c) will only partially abate sewage discharge into waters of the Commonwealth. Furthermore, these engineers advised that the contemplated construction and financing of this project would place an unnecessary and unjustifiable burden upon a majority of the property owners for the benefit of a relatively few property owners whose sewage may have been polluting waters of the Commonwealth; that a third pumping station to eliminate the pollution of waters of the Commonwealth (proposed to be constructed within three years) would require additional sewer facilities presently not economically feasible and impossible to accomplish within the three year period; that the average property owner in the tri-borough area—with an average annual income of $3,800—cannot financially bear the estimated initial expense of $1,000 in addition to the estimated annual minimum sewage rental of $69.40.

Paragraph 15 avers that, when the property owners attempted to bring to the attention of the Authority and the Boroughs the discrepancies in cost (1947, 1958 and 1960) and to obtain a reconsideration of their approval of the engineers' report and the consideration of other alternatives, the Authority and the Boroughs insisted [110-6] that any further investigation be set aside, that the proposed plan of sewer construction be "immediately and arbitrarily approved", and that the Authority, by letter, threatened the plaintiffs and other property owners that, in the event they persisted in legal action, the Authority would hold them responsible, jointly and severally, for damages. Paragraph 16 avers that the Authority has

obtained bids for the sale of bonds for financing the construction of the proposed projects and either has sold or is about to sell such bonds and to award contracts for the construction.

Paragraphs 17 and 18 aver that "defendants have been guilty of a manifest abuse of the legal discretion vested in them [legally] * * *, * * * they have acted arbitrarily, unreasonably, capriciously and not in good faith, so that their decisions and actions * * * have been and are of an unlawful nature * * *" and that, unless defendants are now restrained, immediate, severe and irreparable damage will be caused the property owners.

The preliminary objections raise principally two contentions: (1) that the complaint does not set forth a cause of action; and (2) that the property owners are guilty of laches.

Consideration of the pleadings is rendered more understandable by an examination of the factual background of this controversy as presented by the petition seeking our assumption of original jurisdiction and the answer thereto. In October, 1946 the Sanitary Water Board of the Commonwealth ordered the three Boroughs to either abate the discharge of sewage into waters of the Commonwealth or to submit, jointly or severally, on or before July 1, 1947, a comprehensive sewer plan to the Board for its approval. On or about July 9, 1947 a firm of consulting engineers employed by the three Boroughs rendered a [110-7] preliminary report of a survey and study which it had undertaken and, subsequent thereto, a public meeting was held under the auspices of the East Greenville Borough for a full discussion of the engineers' report. At a later hearing before the Board one of the matters discussed was the problem of sub-surface drainage in the Borough which rendered impossible private abatement of sewage discharge into Commonwealth waters.

Beginning in November, 1959 the Authority publicly advertised for bids for the construction of the sewer system and, pursuant to such advertising, seven bids were received from general contractors. On December 21, 1959 the Authority's consulting engineers reported that the overall cost of the coordinated sewage system, based upon the actual bids received, would be $2,022,447.83.[4] The Federal government has made available to the Authority for this project funds not to exceed $250,000.

The Authority has entered into a contract for the construction of the sewer system, has sold its bonds, as of January 20, 1960, and the bonds were due for delivery on March 29, 1960 but due to this litigation delivery of the bonds has not been made.

On February 5, 1960 at the request of counsel for certain property owners [not the present counsel for the instant property owners] a public meeting was held at which questions were addressed to a panel concerning the proposed construction and financing of the sewer system. This panel was composed of representatives of the Commonwealth's Department of Health, of the Authority's engineers, of bond counsel, of the Authority and the Boroughs, and of the bond [110-8] underwriters.

Three days later three of the present plaintiffs, together with nineteen other property owners, instituted an equity action in the Court of Common Pleas of Montgomery County against the Authority and the Boroughs to restrain the construction of the sewage system. Preliminary objections to this complaint were filed. *On February 11, 1960 in open court the property owners withdrew their action.* It was not until the withdrawal of this action that the Authority entered into the construction contract, ac-

[4] It should be noted that the property owners aver that, on January 25, 1960, the engineers reported an overall cost of $2,579,547.88.

cepted the Federal grant and scheduled a date for the delivery of the bonds.

Subsequent to these events the present action was filed.

Does this complaint present a justiciable cause of action? Our analysis of its allegations indicates that it does not. With one exception, infra, the property owners' accusations are generalities and conclusions unsupported by factual averments. Allegations that the proposed sewer plan is economically not feasible, incomplete and will result in the imposition of an unnecessary and unjustifiable burden on the property owners in the tri-borough area find no support in the facts averred in this complaint. Assuming the truth of all the well pleaded, material and relevant facts and inferences reasonably deducible therefrom, such facts and inferences do not establish any such abuse of discretion or arbitrary and capricious action on the part of these municipal officials such as warrants judicial interference. *Nowhere in the proceeding is there any allegation of any fraud or misconduct on the part of these municipal officials.* Cf.: *Mistick* v. *Cammack*, supra.

The thrust of the property owners' accusations is that the Authority's consulting engineers estimated the cost of the proposed construction in 1946 at $763,000 whereas the same engineers, in 1960, estimated the cost of the proposed construction at $2,592,000. However, [110-9] taking into consideration the larger number of dwelling units to be serviced, the tremendous and unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors, the increase in the estimated costs of this project between 1946 and 1960 does not, standing alone, justify our interposition in this matter.

The property owners want a hearing.[5] Even if such

[5] If a hearing were to be held the matter would be remanded for that purpose to the court below.

hearing were held and *all* the facts *alleged* in the complaint were *proven*, judicial interference would be unwarranted. The legislature has vested in both the Authority and the Borough officials the power and responsibility of conducting governmental affairs in their respective areas: to such officials on the local level is given the right to exercise both judgment and discretion within the sphere of the legislative grant. Courts should be loathe to interfere with or control the performance of the duties of such municipal officials: fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials alone justify judicial intervention.

Such a doctrine finds support in prior decisions of our Court. In *Blumenschein* v. *Pittsburgh Housing Authority*, 379 Pa. 566, 572, 109 A. 2d 331, Chief Justice Horace Stern, speaking for this Court, stated: "By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of [110-10] the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion." In *Neizer* v. *Schuylkill Township School District et al.*, 384 Pa. 323, 121 A. 2d 93, our present Chief Justice, speaking for a unanimous Court, approved an opinion of the Chester County Court of Common Pleas which read, in

part, as follows: "The Board of the School District is the Authority vested with the duty of saying what facilities are adequate and proper for the needs of the School District. What are adequate and proper facilities is a matter of opinion about which reasonable people may differ. Because these plaintiffs are of the opinion that the defendants built too large or elaborate a structure is no reason for holding that they were guilty of bad faith." In *Nine-Ten Chestnut Corporation* v. *Philadelphia Parking Authority*, 373 Pa. 274, 95 A. 2d 553, we held that a court has no authority to overrule a determination made by an authority to construct a particular parking garage, at least in the absence of any accusation of fraud or misconduct or facts indicating arbitrary or capricious conduct on the part of the Authority. In *Parker* v. *Philadelphia*, 391 Pa. 242, 137 A. 2d 343, Mr. Justice Chidsey, speaking for this Court, stated: "It is not sufficient that appellants disagree with the *wisdom* of the City Council's action. A court of [110-11] equity will not substitute its determination of what may be wise for the decision of the appropriate governmental body, absent a showing of bad faith, abuse of power, etc." (P. 249).

We have long recognized a presumption that municipal officers properly act for the public good: *Parker* v. *Philadelphia*, supra; *Downing* v. *Erie City School District et al.*, 362 Pa. 29, 61 A. 2d 133; *Gericke et al.* v. *Philadelphia et al.*, 353 Pa. 60, 44 A. 2d 233. Presumptively, these officials must be regarded as acting properly and for the public good. Absent any allegations in this complaint of either fraud or misconduct and absent any allegations of fact which would indicate that these municipal officials have acted or are acting either in abuse of their power or in a capricious or arbitrary manner, judicial intervention cannot be justified. To label the actions of these officials as capricious or arbitrary does not make them so. A hearing might indicate that the proposed plan is not as complete as it might be, that it involves a greater expenditure of

money than the results would justify or that it was unwise at this time to enter upon such a plan. However, the determination of such facts has been placed in the first instance in the discretion and judgment of the Authority and Borough officials and upon them has been placed responsibility under the law for such determination and judgment. Unless it can be shown—and the facts alleged in the complaint, even if proven, do not so show—that the discretion and judgment of such officials have been motivated by fraud or by complete lack of responsibility or by arbitrary considerations or capricious beliefs, no court should substitute its judgment for that of such officials. To do so would constitute an unwarranted judicial interference with the duties of duly appointed and elected public officials.

[110-12] Even if the property owners proved all the facts set forth in their complaint, as distinguished from the conclusions of law, such facts do not show such conduct on the part of the municipal officials as to justify our interference with their discretion and judgment.

In view of the conclusion which we have reached, it is unnecessary to consider the question whether the property owners are guilty of laches under the circumstances.

The preliminary objections are sustained and the complaint dismissed with prejudice at plaintiffs' costs.

Pertinent Docket Entries

April 18, 1960, argued.

April 26, 1960, the preliminary objections are sustained and the complaint dismissed with prejudice at plaintiffs' costs.

Jones, B. R., J.

May 5, 1960, petition of plaintiffs for reargument filed.

May 18, 1960, answer of defendants to petition for reargument filed.

Order

May 26, 1960

Petition Denied
Per Curiam

COMMONWEALTH OF PENNSYLVANIA }
SUPREME COURT—EASTERN DISTRICT } ss:

I, Charles H. McKibben Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Opinion of the Court and pertinent Docket Entries in the case of George Hyam et al. v. Upper Montgomery Joint Authority, et al. at No. 46 Misc. Dkt. No. 1 as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this First day of June in the year of our Lord One Thousand Nine Hundred and Sixty.

(SEAL)

Prothonotary

APPENDIX B

UPPER MONTGOMERY JOINT AUTHORITY
Serving the Boroughs of East Greenville, Pennsburg, Red Hill

John F. Keelor, President
Wilmer G. Dimmig, Vice President
Clarence R. Richard, Secretary

R. B. Erb, Treasurer
Foster C. Hillegass, Ass't Treasurer
Forrest J. Beyer, Ass't Secretary

NOTICE

February 10, 1960

Mr. Harold M. Romeike
201 West 8th St.
Pennsburg, Pennsylvania

Dear Mr. Romeike

This letter is to acknowledge the Complaint in Equity instituted in your name, and to give you the following notice.

As you undoubtedly know, the proposed sewage system represents the product of ten years careful and extensive planning and development by representatives of the participating municipalities who have had the benefit of exhaustive studies by engineers and legal counsel.

At considerable expense an authority was formed to construct and operate the sewage collection system and treatment plant and to finance the construction by issuing bonds. The plan has been approved by all governmental agencies having jurisdiction. A contract has been let for the Bonds which have been purchased by a syndicate at a favorable interest rate. Bids have been obtained from contractors. Arrangements have been made for a Federal grant to implement the project. This multi-million dollar

project has been seriously jeopardized by your unwarranted action in instituting the aforementioned suit.

As solicitors for the Authority we now advise you of the possible consequences of your action and give you hereby an opportunity to withdraw the "Complaint" and your request for an Injunction, without further expense or embarrassment to you.

All facts requested by your group were explained in detail at well advertised meetings. If, now, notwithstanding the full opportunities afforded your group, you proceed with an action based upon falsehood, and upon spurious, fanciful or frivolous pretexts, the Authority unquestionably will hold you individually and your group jointly responsible in money damages for the resulting losses.

We suggest you consider the total of the following possible losses: (1) Engineering fees to date; (2) Fees of Bond Counsel to date; (3) Fees of local counsel to date; (4) Loss of Federal Grant between $242,000.00 and $250,000.00; (5) Possible increase in the interest rate on a new bond issue; (6) Probable increase in cost of construction on re-bidding of contracts.

This, therefore, is NOTICE to you that should this suit be found to be groundless, frivolous and instituted in bad faith as a malicious abuse of civil process for the mere purpose of embarrassing the Council of the Borough of Pennsburg and the Authority and interfering with the aforesaid contracts and the prospective advantages to be obtained therefrom, we of the Authority will hold you responsible for all damages which may flow from your ill-considered action.

We further urge you to join with that majority in the three boroughs and their duly elected and appointed representatives, to eliminate nuisances and health hazards of many years standing, and in a spirit of progress and public cooperation through the positive program approved and

adopted by your representatives. Your first step can be to withdraw the action that has been instituted.

Very truly yours

RAYMOND PEARLSTINE, WILLARD C. HETZEL and C. EDMUND WELIS,

Solicitors for the
UPPER MONTGOMERY JOINT AUTHORITY

By WILLARD C. HETZEL

Rec'd from officer Moyer 9:25 A.M. Feb. 11, 1960.

L. Yerk & Sweatt

witness—
NEIL SWEATT

APPENDIX C

Original Complaint

The plaintiffs bring this Complaint in Equity against Upper Montgomery Joint Authority, Borough of East Greenville, Borough of Pennsburg and Borough of Red Hill, the defendants, upon a cause of action of which the following is a statement:

1. All of the plaintiffs are citizens and owners of real estate situate within the territories of the Boroughs of East Greenville, Pennsburg and Red Hill, respectively, in Montgomery County, Pennsylvania.

2. The defendant, Upper Montgomery Joint Authority, is a municipal authority incorporated and existing under the Pennsylvania Municipal Authority Act of May 2, 1945, P.L. 382, as amended and supplemented, as so constituted pursuant to ordinances enacted by the Borough Councils of East Greenville, Pennsburg and Red Hill, respectively, in Montgomery County, Pennsylvania.

3. The defendant, the Borough of East Greenville, is a municipal corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania, as a political and governmental subdivision of the Commonwealth of Pennsylvania with legislative and governmental powers within the area of the territory embraced by the boundary lines of the said Borough of East Greenville.

4. The defendant, the Borough of Pennsburg, is a municipal corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania, as a political and governmental subdivision of the Commonwealth of Pennsylvania with legislative and governmental powers within the area of the territory embraced by the boundary lines of the said Borough of Pennsburg.

5. The defendant, the Borough of Red Hill, is a municipal corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania, as a political and governmental subdivision of the Commonwealth of Pennsylvania with legislative and governmental powers within the area of the territory embraced by the boundary lines of the said Borough of Red Hill.

6. By three identical ordinances simultaneously adopted and enacted by the Borough Councils of the Boroughs of East Greenville, Pennsburg and Red Hill, respectively, on March 7, 1960, the said Boroughs approved and entered into an agreement, dated as of March 3, 1960, with the defendant, Upper Montgomery Joint Authority, whereby the Authority covenants to construct a sanitary sewage collection system in and for the aforesaid Boroughs, a sewage treatment plant and other related sewer facilities in and adjacent to and for rendering service in and for the aforesaid Boroughs, and whereby the aforesaid Boroughs each make certain covenants and agreements with respect to the proposed sewer system to be constructed by the Authority, including the enforcement of abutting property owners located in the aforesaid Boroughs to connect

to said sewer system, the granting of certain easements and rights of way to the Authority and other allied matters.

7. Prior to the adoption and enactment of the aforementioned three identical ordinances set forth in paragraph 6 hereinabove, the said Borough Councils of the Boroughs of East Greenville, Pennsburg and Red Hill had also adopted and enacted, simultaneously on February 8, 1960, three identical ordinances by which the said three Borough Councils, respectively, did approve the plan of construction of the proposed sewer system as submitted to them by the Authority, consisting of the plans and specifications and the "Report to the Upper Montgomery Joint Authority, Montgomery County, Pennsylvania, on the Plan to Finance the Construction of the Sanitary Sewer System and Sewage Treatment Plant to Serve the Boroughs of East Greenville, Pennsburg and Red Hill," dated January 25, 1960, as prepared and submitted to the said Authority by their consulting engineers, namely, Albright & Friel, Inc.; and by the said ordinances the said three Borough Councils did also approve the estimated cost of assessable sewers constituting part of the proposed sewer system to be located in each of the said three Boroughs, and the aggregate estimate cost of assessable sewers constituting part of the sewer system to be located in all of the said three Boroughs, and did further approve the proposal of the Authority to charge approximately $866,264 of the total aggregate cost of assessable sewers constituting part of the proposed sewer system against properties benefited, improved and accommodated thereby, as set forth in the above-mentioned Report of Albright & Friel, Inc., by assessment according to the foot front rule.

8. The above mentioned Report of Albright & Friel, Inc., describes the said sewer system as being designed to serve 1534 presently existing dwelling units and states a total estimated cost for the construction and financing of the said sewer system in the amount of $2,592,000 and an esti-

mated average yearly sewer rental per dwelling unit in the amount of $69.40.

9. Long prior to their creation of the defendant Authority, the defendant Boroughs of East Greenville, Pennsburg and Red Hill did by a joint resolution, adopted at a joint meeting of the Borough Councils of the said Three Boroughs on February 24, 1947, did engage and authorize Albright & Friel, Inc., as their Consulting Engineers, to make a preliminary survey, investigation and study for the collection and disposal of sewage from the area of the said three municipalities; and such a survey, investigation and study was thereafter prepared and submitted by Albright & Friel, Inc., to the Borough Councils of the said three Boroughs, in the form of a written Report, under date of July 9, 1947.

10. The said Report of Albright & Friel, Inc., dated July 9, 1947, stated that the said Consulting Engineers had determined that the cost of constructing a joint sanitary sewer system and sewage treatment works for the three municipalities would be $763,000, describing a sewer system to serve 1259 then existing dwelling units in the said three municipalities at an average yearly rental per dwelling unit in the amount of $39.40.

11. The said Albright & Friel, Inc., Report of July 9, 1947, further advised the defendant Borough Councils as follows: "We are momentarily faced with high construction costs. These costs are higher today than at any time in the history of our country. It is, therefore, not advisable for any of the municipalities individually nor the three municipalities jointly, at this time to proceed with the construction of the facilities."

12. Subsequently, in the year 1958, the said Borough Councils of the Boroughs of East Greenville, Pennsburg and Red Hill received from their Consulting Engineers their estimate of the cost of constructing and financing the

proposed sewer system, which was then described as designed to serve 1463 connections, which stated the total estimated cost to be in the amount of $1,950,000, and the estimated average annual cost per connection to be in the amount of $49.95.

13. At a public meeting held in the Pennsburg Civic Building, on Friday evening, February 5, 1960, when the engineer representing Albright & Friel, Inc., was asked to explain the great discrepancy in costs between the proposed sewer system as planned by Albright & Friel, Inc., in 1947, and the sewer system as presently planned by the same Consulting Engineers, he replied that the system proposed in 1947 was designed for 5000 people while the number now proposed to be served is 6000 people, with provisions for expansion, or a 30% increase over the use originally contemplated in the 1947 Report. If, in fact, a 30% increase in the estimated use and service of the proposed sewer system between 1947 and 1960 were the only factor involved, then the estimated cost of construction of the said sewer system should have increased from the quoted figure of $763,000 in 1947 to approximately $991,900 in 1960. No other facts which could reasonably explain the additional substantial increase in total cost to the estimated figure of $2,592,000 as set forth in the Albright & Friel, Inc., Report of January 25, 1960, have been stated by the defendants or by their Consulting Engineers.

14. The plaintiffs have themselves engaged the services of a firm of professional Consulting Engineers, namely Tumarkin, Morgan & Emerman, of New York City, New York, for the purpose of making an investigation and study of the plans and specifications and Report of January 25, 1960, prepared by Albright & Friel, Inc., pertaining to the proposed sewer system; and after making such investigation and study their Consulting Engineers have advised the plaintiffs that in their professional opinion:

(a) the proposed sewer system project as described in the Albright & Friel, Inc., plans and specifications and Report of January 25, 1960, is not economically feasible;

(b) the said sanitary sewer system as so proposed is not a complete sewer system for each of the said three Boroughs;

(c) the alleged nuisance of sewage discharge into the waters of the Commonwealth of Pennsylvania will only be partially abated by the construction and operation of the proposed sewer system;

(d) The construction and financing of the said sewer system as proposed would place an unnecessary and unjustifiable burden upon the majority of the taxpayers and property owners of the said three Boroughs for the benefit of a relatively few persons whose sewage may have been polluting the waters of the Commonwealth.

(e) a third pumping station which is proposed to be constructed three years hence will require additional sewer systems, pumping equipment, interceptor sewers and force mains which are not economically feasible at the present time and cannot be made economically feasible within three years from the present time.

(f) the average yearly income of the average property owner in the said three Boroughs (estimated at approximately $3800 per year) is insufficient to sustain the immediate and continuing burden of financing the said sewer system as proposed with an initial expense by way of assessment to each such property owner in an average amount of approximately $1,000, in addition to which an annual minimum sewer rental in the average amount of $69.40 per dwelling unit would be imposed upon each of the families having properties within the areas of the said three Boroughs to be served by the proposed sewer system, all of which would be an unjustifiable financial hard-

ship upon the said property owners and would not be economically feasible.

15. When the plaintiffs and other interested property owners and tax payers in the said three Boroughs attempted to bring to the attention of the defendants the glaring discrepancies in estimated costs between the aforementioned Engineers' Reports of 1947, 1958 and 1960, and to obtain reconsideration by the defendants of their approval of the Albright & Friel, Inc., Report of January 25, 1960, and consideration of other preferable and less expensive alternatives for the abatement of any alleged sewage discharge in the waters of the Commonwealth, the defendants insisted that all investigation be put aside and that the sewer system as proposed in the Albright & Friel, Inc., Report of January 25, 1960, be immediately and arbitrarily approved, even to the extent that the defendant Upper Montgomery Joint Authority, through its solicitors, delivered threatening and intimidating letters to the plaintiffs and other taxpayers and property owners, by which the plaintiffs were warned and threatened by the defendant Upper Montgomery Joint Authority that, if they should proceed with legal action against the said defendant, the said defendant would hold them individually and jointly responsible in substantial money damages.

16. The defendant Authority has obtained bids for the sale of its bonds for the financing of its proposed sewer system project, is now about to sell its bonds or has sold them and is about to award contracts for the construction of the said sewer system or a part thereof.

17. By so acting under the circumstances and in the manner described hereinabove, the defendants have been guilty of a manifest abuse of the legal discretion vested in them by the Laws of the Commonwealth of Pennsylvania, and they have acted arbitrarily, unreasonably, capriciously and not in good faith, so that their decisions

and actions as above described have been and are of an unlawful nature and such as should be equitably restrained.

18. Unless the defendants are now restrained and enjoined from proceeding with the financing and construction of the proposed sewer system, the plaintiffs will suffer immediate, severe and irreparable damage.

WHEREFORE, plaintiffs respectfully pray your Honorable Court to enter a decree enjoining the defendants, Upper Montgomery Joint Authority, Borough of East Greenville, Borough of Pennsburg and Borough of Red Hill, perpetually, from:

1. Issuing and selling any revenue bonds for the financing of the said proposed sewer system.

2. Accepting or using any monies granted by the government of the United States of America or by the Commonwealth of Pennsylvania for use in connection with the construction, operation and financing of any part of said sewer system.

3. Instituting any condemnation proceedings for the acquisition of property or easements in connection with the proposed construction of the said sewer system or any part thereof.

4. Proceeding with any work or excavation or construction or the awarding of any contract of any kind for any such work in connection with the establishment and operation of the said proposed sewer system.

5. Levying any assessment for any part of the cost of construction or operation of the said proposed sewer system against any properties hereafter to be benefited, improved or accommodated thereby.

The plaintiffs for such equitable relief as may appear to your Honorable Court as necessary and appropriate.

APPENDIX D

TUMARKIN, MORGAN & EMERMAN
Consulting Engineers
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March 31, 1960

Tri-Boro Citizens Committee
Pennsburg, Penna.

Att: Mr. Charles Weyand, Chairman

Re: Sewage System—Upper Montgomery Authority

Reference: Our Preliminary Report of March 9, 1960

Gentlemen:

1. The recent decisions of the Councils of East Greenville and Pennsburg to install two sets of sewers in alleys parallel to and in lieu of one sewer in Main Street aggravates the present situation and is further proof that this project is not economically feasible. The drawings do not indicate that test pits and/or borings were taken along the center line of the proposed sewer. According to the plans and the report, there are approximately 120,000 linear feet of sewer pipe and a primary and secondary treatment plant, designed for 6,000 people. Under today's high prices, not including rock excavation, the average cost for this size sewer system is $50,000.00 per mile plus $300,000.00 for the cost of one primary and secondary sewage treatment plant, including interceptor sewers; and the cost of the overall sewer system with two pumping stations should be approximately $1,500,000.00.

2. We have been advised that of the 4,800 persons, who would use the project, 600 are retired on Social Security or are widows living on pensions and can ill afford to pay for their share of this expensive project.

3. The sanitary sewer system, as proposed, is not a complete system for each Borough. Annexed hereto and made part of this report are plans of each Borough, showing those homes and other buildings that will not connect to the proposed sewers. This permits taxpayers in the Boroughs, not abutting on the sewer lines, to dispose of their sewage cheaply. The schools which have their own sewage disposal system, and even those, abutting on the sewers, are not included for connection or the sewers are not carried close enough to homes in order to connect. This prevents large sewer rentals and assessments from being included, which would be a saving to abutting taxpayers. The failure to include and to design for all homes and buildings in the Boroughs prevents this from being a complete system for each Borough.

4. The sewage disposal into the waters of the Commonwealth will be only partially abated. The drawings annexed hereto indicate that 212 homes situated in the three Boroughs and in the surrounding watershed area will not be connected and there are no extensions proposed with the exception of one for 13 homes to be connected to the sewer system sometime in the future. This means that over 16% of the homes, which may be polluting the watershed streams, will not be connected and therefore, would not be abating and possibly continuing the nuisance.

5. The majority of the taxpayers, abutting the new sewer lines will be paying for a sewer system required to abate a nuisance created by a minority of taxpayers abutting existing sewers. It would be quite expensive for the few taxpayers involved to abate the nuisance and to construct the necessary disposal plant because of the cost of land to accommodate the plant and the plant itself. However,

there is no less expensive way to abate a major nuisance than to assess all taxpayers and to require their connection to a sewer system constructed for the benefit of a minority.

6. The decisions of the Boroughs of Pennsburg and East Greenville to rescind previous resolutions for a one pipe system on Main Street in favor of a twin parallel system in alleys will add further to the costs. The cost to the taxpayers has shown a sharp increase due to doubling the linear feet of pipe required. Economy, at present can best be realized by considering a design for 6,000 people for twenty years with two small disposal plants and one pumping station. The lineal feet of pipe can be reduced in solving the present abatement with the use of settling tanks, cesspools and/or septic tanks, et or isolated houses and farms. This will deduct fu r from the present burden to be placed upon the taxpayers.

Respectfully submitted,

TUMARKIN, MORGAN & EMERMAN

By EGBERT P. MORGAN
Egbert P. Morgan P. E.

EPM:ms

APPENDIX E

Pertinent Excerpts of Statute Involved

Purdon's Penna. Statutes Annotated, Title 53

§ 306. Purposes and powers; general

A. • • • • •

B. • • • • •

(a) • • • • •

(i) To borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations (herein called "bonds") of the Authority, said bonds to have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date later than the life of the Authority, and to secure the payment of such bonds or any part thereof by pledge or deed of trust of all or any of its revenues and receipts, and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the Authority shall deem advisable, and in general to provide for the security for said bonds and the rights of the holders thereof, and in respect to any project constructed and operated under agreement with any Authority or any public Authority of any adjoining state, to borrow money and issue such notes, bonds and other evidences of indebtedness and obligations jointly with any such Authority.

• • • • •

§ 307. Purposes and powers; bonds

A. The bonds of any Authority hereinabove referred to and authorized to be issued, shall be authorized by resolution of the board thereof . . .

• • • • •

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Clerk

No. 150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE HYAM, ET AL., *Appellants*

v.

UPPER MONTGOMERY JOINT AUTHORITY and the BOROUGHS OF EAST GREENVILLE, PENNSBURG AND RED HILL, *Appellees*

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

MOTION TO DISMISS

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July 15, 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 150

GEORGE HYAM, ET AL., *Appellants*

v.

UPPER MONTGOMERY JOINT AUTHORITY and the BOROUGHS OF EAST GREENVILLE, PENNSBURG AND RED HILL, *Appellees*

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

MOTION TO DISMISS

Having previously raised no federal question, appellants in their petition for rehearing before the Supreme Court of Pennsylvania for the first time urged infringement of their rights under the Fifth and Fourteenth Amendments of the United States Constitution in their action to enjoin, as "costly and insufficient," construction of a sewage system by appellees. The Pennsylvania Supreme Court, which had dismissed

appellants' complaint as a matter of state law, denied the petition for rehearing without intimating any view as to the merits of the untimely raised federal questions.

Accordingly, appellees move the Court to dismiss this appeal pursuant to paragraph 1 of Rule 16 for the reasons that (1) the federal questions sought to be reviewed were not timely raised by appellants, or expressly decided by the Supreme Court of Pennsylvania; (2) the judgment sought to be reviewed rests on an adequate non-federal basis; and (3) the appeal does not in any event present a substantial federal question.

OPINION BELOW

The unanimous opinion of the Supreme Court of Pennsylvania dismissing appellants' complaint, not yet officially reported, is unofficially reported at 160 A. 2d 539.

STATEMENT

On March 21, 1960, appellants filed a complaint in the Common Pleas Court of Montgomery County, Pennsylvania, seeking to block construction of a sewage system that had been jointly undertaken by appellees.[1] (Juris. St. p. 15a)

The project whose construction was sought to be enjoined culminated fourteen years of exhaustive

[1] The appellee Boroughs are incorporated political subdivisions of the Commonwealth of Pennsylvania possessing legislative and governmental powers. The appellee Joint Authority was created by the Boroughs under state law to construct a sewage system serving their inhabitants. (See n. 2, p. 3, *infra*)

investigation by the three Boroughs into the most feasible and economical means to solve sewage problems which had been highlighted by an order from the Sanitary Water Board of Pennsylvania on October 4, 1946 that the Boroughs stop discharging their sewage into waters of the Commonwealth. (Juris. St. p. 6a) Impelled by that directive to take immediate action, the Boroughs authorized engineering surveys of their areas to be made. Since preliminary surveys demonstrated that subsurface drainage problems precluded disposal of sewage by individual householders, further surveys were authorized for a joint community system. *Ibid.* In 1948 and again in 1958, reports and cost estimates were submitted by the consulting engineers employed by the Boroughs. (Juris. St. p. 4a)

On May 7, 1958, the Boroughs simultaneously adopted resolutions authorizing creation of the appellee Joint Authority to construct and operate a sewage system for the Boroughs in accordance with the Pennsylvania Municipal Authorities Act of 1945.[2]

On February 5, 1960, at the request of counsel for appellants, appellees jointly conducted a public hearing on the final engineering report and construction plans. (Juris. St. p. 7a) This was the latest of numerous hearings held by appellees to air publicly every aspect of the sewage problem, including the increased cost of

[2] This legislation allows any municipality, by itself or jointly with other municipalities, to organize an authority for the purpose of constructing and operating public improvements such as sewage systems, waterworks and school buildings. Pa. Stat. Ann. tit. 53, §§ 301-322 (1957). The Act's validity under the state constitution was upheld by the Pennsylvania Supreme Court in *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A. 2d 474 (1952).

the system as finally approved over earlier engineering estimates. (Juris. St. pp. 4a-7a)[3]

Being satisfied that fourteen years of unrestricted public debate had exhausted, but not remedied, their sewage problem and that further hearings would not be profitable, appellees moved ahead after the hearing to construct the system. Accordingly, on February 8, 1960, the Boroughs simultaneously enacted ordinances formally approving the Joint Authority's construction plan, the estimated cost of the facilities assessable in each Borough, the estimated cost of the entire system as computed from the lowest of seven competitive bids and the Joint Authority's proposal to assess approximately $870,000 of the total cost against the properties benefited in accordance with Pennsylvania's statutory front foot rule. (Juris. St. p. 17a)

On the same day, a small group of property owners, including three of the present appellants, instituted an action in the Common Pleas Court of Montgomery County to enjoin construction of the sewage system. (Juris. St. p. 7a) Three days later this action was voluntarily withdrawn. *Ibid.*

Thereafter, on March 7, 1960, the Boroughs simultaneously enacted ordinances formally approving an agreement with the Joint Authority for construction of a sewage collection system, a treatment plant and re-

[3] Appellants complain (Juris. St. p. 6) that the increased cost of the system was not "satisfactorily" explained. But as the court below noted, and as was explained to appellants at the hearing, the 1960 cost reflected "the larger number of dwelling units to be serviced" as well as "the tremendous and unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors." (Juris. St. p. 8a) (emphasis in original)

lated facilities to serve their inhabitants. (Juris. St. p. 3a) In the meantime, the Joint Authority arranged for the sale of its bonds to finance the project and delivery of the bonds was scheduled for March 29, 1960. (Juris. St. pp. 6a-8a)

Before delivery of the bonds was effected, the present complaint was filed on March 21, 1960, seeking to enjoin construction of the sewage system. (Juris. St. p. 15a)[4] The complaint alleged that according to a report prepared by engineers hired by appellants the sewage system approved by appellees was "not economically feasible," was "not a complete sewer system" and would only "partially" abate sewage discharge into the waters of the Commonwealth. (Juris. St. p. 20a) On March 31, 1960, appellees filed a motion to dismiss the complaint on the ground that it did not state facts sufficient to entitle appellants to relief. (Juris. St. p. 2a)

On the same day, appellees petitioned the Supreme Court of Pennsylvania to assume original jurisdiction of the proceeding pursuant to Section 3 of Article V of the Pennsylvania Constitution. *Ibid.* Over appellants' objection, the Supreme Court granted the petition. (Juris. St. pp. 2a-3a)

The case was heard by the Pennsylvania Supreme Court on appellants' complaint and appellees' prelimi-

[4] Since a non-litigation certificate must accompany the bonds, the current litigation has seriously delayed the project. If further delay is encountered, there is a substantial possibility that appellees will lose a contribution of one quarter of one million dollars from the federal government pursuant to the federal Water Pollution Control Act, 33 U.S.C. §§ 466-466k, which authorizes grants to states to "assist them" in meeting the costs of establishing and maintaining adequate measures for the prevention and control of water pollution." § 466 d(a).

nary objections in the nature of a demurrer that appellants had failed to allege facts which would warrant judicial inquiry into the feasibility or adequacy of this local public improvement. (Juris. St. p. 2a)

In their supporting brief, appellants renewed their objection to the court's discretionary exercise of its original jurisdiction and contended that, in any event, they were entitled to a hearing in the Common Pleas Court in order to prove their allegations that the proposed sewage system was "costly and insufficient." According to their brief,

> "It will be necessary to remand this case to the Court of Common Pleas for a hearing to determine the facts, either (a) because the case presents no unusual exigencies sufficient to justify the Supreme Court in retaining original jurisdiction; or (b) because the controversy is a factual one which cannot be disposed of as a matter of law on defendants' demurrer and which requires a hearing on the allegations in the complaint as to arbitrary and capricious conduct on the part of the defendants amounting to a manifest abuse of discretion and bad faith." (Plaintiffs' Br. p. 7)

The Pennsylvania Supreme Court unanimously rejected appellants' arguments and dismissed their complaint on April 26, 1960. As analyzed by that court,

> "the thrust of the [appellants'] accusations is that the Authority's consulting engineers estimated the cost of the proposed construction in 1946 at $763,000 whereas the same engineers, in 1960, estimated the cost of the proposed construction at $2,592,000." (Juris. St. p. 8a)

But,

> "taking into consideration the larger number of dwelling units to be serviced, the tremendous and

> unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors, the increase in the estimated costs of this project between 1946 and 1960 does not, standing alone, justify our interposition in this matter." *Ibid.* (emphasis in original)

Emphasizing that under its prior decisions a showing of "fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials [would] justify judicial intervention," the court found that appellants' allegations did not constitute such a showing, but instead were "generalities and conclusions unsupported by factual averments." (Juris. St. pp. 8a-9a) Moreover, even "assuming the truth of all the well pleaded, material and relevant facts and inferences reasonably deducible therefrom, such facts and inferences do not establish any such abuse of discretion or arbitrary and capricious action on the part of these municipal officials as warrants judicial interference." *Ibid.* For "unless it can be shown—and the fact alleged in the complaint, even if proven, do not so show—that the discretion and judgment of such officials have been motivated by fraud or by complete lack of responsibility or by arbitrary considerations or capricious beliefs, no court should substitute its judgment for that of such officials." (Juris. St. p. 11a)

As to appellants' request for a hearing on the factual allegations of their complaint, the court declared that "even if such hearing were held and *all* the facts alleged in the complaint were *proven*, judicial interference would be unwarranted." (Juris. St. pp. 8a-9a) (emphasis in original) For the most that appellants could prove at such a hearing would be that the "proposed

plan is not as complete as it might be, that it involves a greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan." (Juris. St. pp. 10a-11a) But these are matters which the Pennsylvania legislature has committed to the "discretion and judgment of the Authority and Borough Officials and upon them has been placed the responsibility under the law for such determination and judgment." *Ibid.* Any other view, the court concluded, "would constitute an unwarranted judicial interference with the duties of duly appointed and elected public officials." *Ibid.*[5]

On May 5, 1960, appellants filed a petition for rehearing. Besides reiterating their previous contentions that the proposed system was "costly and insufficient," appellants urged, for the first time, that "to allow the [appellees] to proceed with the construction and operation of their proposed sewer system and with the proposed imposition of monetary assessments upon the properties of the [appellants] for the cost thereof, without first granting the [appellants] an opportunity to be heard and to have judicial review of the facts" violated federal constitutional rights. (Pet. p. 6)[6]

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[5] In view of its disposition of the case, the court did not reach the question of laches also raised by appellees. (Juris. St. p. 11a)

[6] Actually, at no time prior to their petition for rehearing did appellants contend, *even as a matter of state law*, that they were entitled to the hearing which they in fact received before appellees. The only forum in which appellants claimed a right to be heard was the Common Pleas Court (Plaintiffs' Br. p. 7)—which is just another way of saying that the issue before the Pennsylvania Supreme Court was whether their complaint set forth a claim entitling them to relief. If it had, they would have gotten a hearing in the Common Pleas Court. (Juris. St. p. 8a, n. 5)[7] But what appellants wanted to prove, *i.e.*, "that the proposed plan

Without expressing any view as to these untimely raised questions, the Pennsylvania Supreme Court denied the rehearing petition on May 26, 1960. (Juris. St. p. 12a)

ARGUMENT

As will be detailed, the court below decided the only question presented to it, *i.e.*, whether, as a matter of state law, appellants had alleged facts warranting judicial intervention to review the feasibility and adequacy of a joint public improvement by appellees. The court did not pass upon any federal question involving the alleged right of appellants to a hearing, either before appellees or the Common Pleas Court, since those questions were untimely raised for the first time in their petition for rehearing. On this record, there is no basis for review of the decision below by this Court.

Moreover, appellants were in fact given notice and afforded numerous opportunities to be heard by appellees before the proposed sewage system was finally approved, and hence were accorded all of the rights to which they were properly entitled. In addition, no litigant has a constitutional right to an evidentiary hearing on a complaint that fails to state a claim upon which relief can be granted. Consequently, no substantial federal question would be raised by this appeal even if appellants had properly presented their claims under the Constitution of the United States to the court below.

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is not as complete as it might be, that it involves a greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan," did not entitle them to a hearing. (Juris. St. pp. 10a-11a)

I.

The Court Below Did Not Decide Any of the Federal Questions Untimely Raised by Appellants, and Its Decision Rests on an Adequate State Ground

The sole question decided by the Supreme Court of Pennsylvania was that appellants' complaint, when tested by *state* standards for judicial review of legislative action by municipal officials, did not allege facts which would warrant judicial inquiry into the economic feasibility or operational sufficiency of a sewage system. As explained by that court, "Absent any allegations in this complaint of either fraud or misconduct and absent any allegations of fact which would indicate that these municipal officials have acted or are acting either in abuse of their power or in a capricious or arbitrary manner, judicial intervention cannot be justified." (Juris. St. p. 10a) This holding is fully consistent with controlling state law and constitutes an unassailable ground for decision and disposition of the case.

Appellants' effort to transform that ruling into a decision in favor of a state statute whose validity was drawn in question as repugnant to the Constitution of the United States is not only specious, but is belied by appellants' unavoidable concession that the federal questions sought to be reviewed here were raised for the first time in their petition for rehearing addressed to the Supreme Court of Pennsylvania. (Juris. St. p. 13)[7]

[7] Appellants cannot protest that the petition for rehearing was their first opportunity to raise these questions. Essentially the same grounds of objection were raised throughout the proceeding, but solely as a matter of state law. In both the Common Pleas Court and Pennsylvania Supreme Court there was every opportunity to cast these objections in terms of federal constitutional

Equally baseless is the mute premise of appellants' jurisdictional statement that the court below did in fact rule on the merits of their afterthought argument that federal questions were actually buried somewhere in their original attack on the sewer project. This premise, nowhere referenced to the text of the opinion below, defies confirmation in either the state court's basic decision on the merits or its summary two-word denial of the petition for rehearing. (Juris. St. p. 12a)[8]

Plainly revealing no decision below as to any of the federal questions sought to be reviewed here, the record thus defeats this appeal. For it is axiomatic that federal questions first presented to the highest state court in a petition for rehearing come too late for consideration in this Court unless the state court actually entertains and expressly decides the questions.[9] In short, this Court sits to review significant federal questions

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rights. Nor can appellants claim that the federal questions sought to be reviewed arose from an unanticipated disposition of the proceeding by the Supreme Court of Pennsylvania. Cf. *Brinkerhoff Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930); *Ohio* v. *Akron Metropolitan Park District*, 281 U.S. 74, 79 (1930).

[8] The Pennsylvania Supreme Court's refusal to entertain and decide the federal questions raised for the first time in the petition for rehearing conformed in all respects with that court's rehearing practice. See, for example, *In re Dorrance's Estate*, 172 Atl. 900 (Pa. 1933), *affirming*, 309 Pa. 151, 163 Atl. 303 (1932), *cert. denied*, 287 U.S. 660 (1932), 288 U.S. 617 (1933).

[9] *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); *American Security Co.* v. *Baldwin*, 287 U.S. 156, 163-164 (1932); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Forbis* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910); *Simmerman* v. *Nebraska*, 116 U.S. 54 (1885); and compare *Dorrance* v. *Pennsylvania*, 287 U.S. 660, 661 (1932).

actually decided by state courts, not undecided questions untimely raised by counsel.

II.

The Federal Questions Sought To Be Reviewed Are Without Merit

In any event, assuming that the federal questions sought to be reviewed are properly here, they are nonetheless totally without merit.

In the first place, with respect to appellants' belated contention that they were entitled to a hearing before the appellee Boroughs and Joint Authority, the facts are that appellees publicly announced what action was contemplated, invited comments and permitted arguments to be made at numerous public meeting hearings in order to insure informed action on their part and to give their inhabitants every chance to influence the final decision. (Juris. St. pp. 4a-7a) Thus, numerous public hearings *were* held to consider the sewage problem and its solution. Indeed, one of these hearings was called at appellants' own request to consider the very matters which form the basis for their complaint that the proposed sewage system is "costly and insufficient." (Juris. St. p. 6, 7a)

No more was required by either the Fifth or Fourteenth Amendments. For surely fourteen years of public debate, punctuated by numerous public hearings, satisfies even the most rigorous demands of the Constitution. Particularly appropriate here is the recognition by Mr. Justice Holmes in *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915), that "there must be a limit to individual argument in such matters if government is to go on." *Id.* at 445.

Appellants' undocumented assertion that the hearing which they admittedly were afforded was "not a 'hearing' within the meaning of procedural due process" (Juris. St. p. 6) is hardly enlightening as to what more was necessary than open and unrestricted public meeting hearings. If by that claim appellants are contending that they were entitled to a judicial, rather than legislative, type hearing before these municipal bodies, they have grievously misread the decisions of this Court.

Municipal governments, like state legislatures, by reason of their representative character, may act without providing opportunity for formal party participation. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). Instead, as was done here, it is customary to afford opportunity for public participation by informal legislative type hearings. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 303 308 (1933).[10] Only a most extravagant view, one which is oblivious to the basic and traditional differences between the legislative and the judicial functions, would require a courtroom type proceeding to determine matters of public im-

[10] Even this type of hearing is not always indispensable, for "the Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). See, for example, *Chesebro* v. *Los Angeles County Flood Control District*, 306 U.S. 459, 463-465 (1939); *Browning* v. *Hooper*, 269 U.S. 396, 405 (1926); *Hancock* v. *Muskogee*, 250 U.S. 454, 455-458 (1919); *Withnell* v. *Ruecking Construction Co.*, 249 U.S. 63, 68-70 (1919).

Statutes such as the Administrative Procedure Act expressly codify the distinction between legislative and judicial type hearings. Compare Section 4(b) with Sections 5 and 7 of that Act. 5 U.S.C. §§ 1003(b), 1004, 1006.

provements. Such a procedure—clumsy, expensive and inefficient when applied to the legislative process—has never been a constitutional requirement for the conduct of local legislative affairs. See *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915); cf. *Bell's Gap R.R. Co.* v. *Pennsylvania*, 134 U.S. 232, 239 (1890).

Appellants' demand for an evidentiary hearing on their complaint in the state Common Pleas Court is also untenable.

As detailed above, the Supreme Court of Pennsylvania unanimously dismissed the complaint because, as a matter of state law, appellants had failed to allege facts which would warrant judicial inquiry into the economic feasibility or operational sufficiency of the contemplated sewage system. According to that court, the most that appellants could prove at a hearing in the Common Pleas Court would be that the proposed plan is not as complete as it might be, that it involves greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan." (Juris. St. pp. 10a-11a) Such evidence, however, would not have warranted judicial intrusion into matters committed to the "discretion and judgment of the Authority and Borough Officials." *Ibid.* Clearly, that decision does not, as argued by appellants, insulate arbitrary and capricious action by municipal officials from judicial review; nor was it intended to relieve those officials of the pertinent demands of due process. (Juris. St. p. 9a)[11]

[11] Similarly far-fetched is appellants' claim that the Pennsylvania Municipal Authorities Act violates the Fourteenth Amendment because it makes no express provision for judicial review. (Juris. St. p. 3) In the first place, the Act does provide for judicial review

There is obviously no constitutional right to a hearing on a complaint that fails to state a claim upon which relief can be granted. Indeed, if that were the law, Rule 12(b)(6) of the Federal Rules of Civil Procedure, which authorizes federal district courts to dismiss complaints for "failure to state a claim upon which relief can be granted," would be unconstitutional.[12]

Nashville, C. & St. Louis Ry. v. *Walters*, 294 U.S. 405 (1935), one of the few relevant cases cited in the jurisdictional statement (p. 16), confirms the correctness of the decision below.[13] In that case, this Court

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as the Pennsylvania Supreme Court noted in *Mistick* v. *Cammack*, 397 Pa. 296, 154 A. 2d 588 (1959). Secondly, in the case at bar, the Pennsylvania Supreme Court declared that "fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials" will in all events warrant judicial review. (Juris. St. p. 9a)

[12] A motion to dismiss under Rule 12(b)(6) performs substantially the same function as appellees' common law demurrer in the court below. 2 Moore, Federal Practice ¶ 12.08 (2d ed. 1948). Cf. *Chesebro* v. *Los Angeles County Flood Control District*, 306 U.S. 459 (1939); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176 (1935).

Only six months before, in *Mistick* v. *Cammack*, 397 Pa. 296, 154 A. 2d 588 (1959) (where, as here, the Pennsylvania Supreme Court had assumed original jurisdiction over a proceeding to enjoin construction of a water system), after appraising the complaint upon demurrer, the court remanded the proceeding to the Common Pleas Court for an evidentiary hearing because that complaint, unlike the one here, "set forth a valid cause of action, which, if proved, would entitle him to the relief he seeks." 154 A. 2d at 590.

[13] Appellees agree that *Thompson* v. *Louisville*, 362 U.S. 199 (1960) (discussed in the jurisdictional statement at page 19) is a "grand" case, but its relevance here is difficult to discover. The cases cited at pages 15 and 18 of the jurisdictional statement are equally remote.

reversed a decision by the Supreme Court of Tennessee because the state court had "declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable." *Id.* at 414. Writing for this Court, Mr. Justice Brandeis explained that the Tennessee Supreme Court, unlike the court below, did not find that the "evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State * * * was arbitrary and unreasonable," but instead simply refused to consider them at all. *Id.* at 415-416. Surely appellants can gain no comfort from that case since the court here did precisely what the Tennessee court had failed to do, *i.e.*, carefully considered the factual averments in the complaint to determine whether they set forth a claim entitling appellants to relief.

CONCLUSION

The burden rests heavily upon one who seeks to use the federal constitution to strike down public improvements by municipalities dealing with health hazards to their inhabitants. Essential to Supreme Court review in such cases is that the federal question shall have

been timely raised and actually decided by the highest state court. That was not done in the case at bar.

Accordingly, the appeal should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 150

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEVLR, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT, *Appellants*,

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG, AND BOROUGH OF RED HILL, *Appellees*.

On Appeal From the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appellees have contended by a Motion to Dismiss, that Appellants failed to raise the Federal Questions in this case at the earliest opportunity.[1] (Motion, p. 10, et seq.) Before reaching this erroneous conten-

[1] The other points raised in Appellees' Motion are amply covered in Appellants' Jurisdictional Statement.

tion, Appellants call this Court's attention to the unusual legal path this case has followed.

The action was initiated by Appellants with a Complaint in Equity in the Court of Common Pleas of Montgomery County. That Court never tried the action. In the Complaint, Appellants raised no Federal Question because it was fully expected that a hearing would be afforded in that Court on the merits. Then Appellees petitioned the Supreme Court of Pennsylvania to take original jurisdiction. In their Answer to that Petition Appellants clearly, and unequivocally prayed that Court to remand to Common Pleas "for hearing on the same in due course to the end that the plaintiffs may receive justice and equity in a full hearing of all the facts and circumstances of the cases" (Ans. p. 9) True, no Constitutional citation was made, but the right asserted unmistakeably is founded in that document. No fine technicality of language can erase from that Answer the clear demand for a Constitutional right.

However, it is not necessary to find that this Federal Question was raised in the Answer. Until the Supreme Court of Pennsylvania denied the hearing to Appellants, the latter had no reason to raise the question.

No right to a hearing was denied until then, so that asserting violations of the Federal Constitution in the Petition for Reargument was timely.

A brief review of this case will show the error of Appellees' contention.

The proposed sewer system of Appellees would burden the 4800 residents of these three suburbs with a cost of over $2,500,000, and levy upon each property

owner an assessment of $1,000., with an annual charge of $69.40. Appellants retained, at their own expense, a firm of well-known consulting engineers to study the plan. These engineers reported that the sewer system was incompetently conceived, inadequate to meet the community needs, and should actually cost between one and one-and-a-half million dollars less than Appellees planned to spend.

Moreover, the engineers pointed out that of the 4800 persons to be served by the sewer system, "600 are retired on Social Security or are widows living on pensions," whose average annual income is $3,800. The proposed assessment of $1,000 per family amounts to one-third of their income after taxes.

Since Appellees would not call a hearing at which Appellants' engineers could testify, and the Pennsylvania Act does not provide for a hearing, Appellants filed a suit before the Court of Common Pleas of Pennsylvania to enjoin Appellees from proceeding.

Appellants fully expected on the trial at Common Pleas to call its consulting engineers as witnesses and prove to the Court's satisfaction that it should enjoin the proposed sewer system as ill-conceived and extravagant.

Instead of meeting Appellants on the merits in the trial court, Appellees petitioned to remove the case from the Court of Common Pleas directly into the Supreme Court of Pennsylvania. That petition was granted.

Before the Supreme Court of Pennsylvania Appellants asked that the complaint be remanded to Common

Pleas for a hearing to determine the truth of its allegations. (Brief, Sup. Ct. Pa. p. 7).

Under *Blumenschein v. Pittsburgh Housing Authority*, (1954) 379 Pa. 566, 573, 109 Atlantic 2d 331, Appellants had every reason to believe that the Supreme Court of Pennsylvania would accord them the requested hearing before the Court of Common Pleas. In that case a hearing was had before the Chancellor of the Common Pleas Court concerning the actions of the Housing Authority in certain slum clearance activities. Although the Pennsylvania Supreme Court finally ruled against the appellants there, a full hearing in a case similar to appellants' here—had been accorded the appellants there before the appeal. Therefore, appellants were clearly entitled to assume they also would be afforded a hearing in Common Pleas until the Pennsylvania Supreme Court decided the instant case.

When to Appellants' surprise and dismay, the Supreme Court of Pennsylvania dismissed their complaint *without a hearing*, Appellants filed a Petition for Reargument.

There, Appellants said what they say here:

> "Plaintiffs do not ask this Court to determine which of the allegations of fact are true. What plaintiffs ask is that this Court remand the case for a hearing on the facts so that an injunction may issue against defendants from proceeding with their expensive and insufficient sewer system because of defendants' arbitrary and capricious refusal to consider the findings of plaintiffs' consulting engineers." (p. 4, Petition for Reargument)

Until the Supreme Court of Pennsylvania had denied them a hearing, there was no opportunity for

Appellants to raise the point that that denial was unconstitutional.

Thus, it is that the Petition for Reargument is the first time the Appellants allege that the refusal to give them a hearing deprives them of due process of law and of their privileges and immunities as citizens of the United States under the Fourteenth Amendment to the Constitution of the United States (p. 5, Petition for Reargument).

A citizen cannot contend he has been deprived of a constitutional right before it happens. But certain it is, as soon as it happened, appellants raised the objection in their Petition for Reargument to the Supreme Court of Pennsylvania.

Thus, under the well-settled rule of *Saunders v. Shaw*, (1917) 244 U.S. 317, 37 S.C. 638, 61 L. ed. 1133, the constitutional point was timely raised.

There Mr. Justice Holmes said:

> "When the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, * * * it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." (p. 320)

As if he had our case in mind, Justice Holmes continued:

> "The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance." (p. 320)

As a matter of fact this case is even stronger than *Saunders* v. *Shaw*, because, as we have pointed out before coming here, appellants took the precaution to call to the attention of the Supreme Court of Pennsylvania that their refusal to give appellants a hearing deprived them of a constitutional right.

The two leading texts on Supreme Court Practice agree and point out that under these circumstances, it does not matter that the state Court (as the Supreme Court of Pennsylvania did here) denies the Petition for Reargument without opinion.

> "If the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only chance to present the matter to that court. Accordingly, the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true even if the petition for rehearing is summarily denied without reference to the federal question." (P. 89, Stern and Gressman, 2nd Edition "Supreme Court Practice" 1954, B.N.A. Inc.).

> "The raising of the federal question in a petition for rehearing is timely if it appears that the question was first brought into the case by an unexpected decision of the highest state court, and that the litigants had no opportunity to assert the claimed federal right or immunity." (Wolfson and Kurland's Edition of Robertson and Kirkham on the Jurisdiction of the Supreme Court of the United States, 1951, Matthew Bender and Company.)

None of the cases cited by Appellees are remotely in point except *Brinkerhoff-Faris Trust and Savings Co.*

v. *Hill* (1930) 281 U.S. 673, which is an authority in support of Appellant.[2]

There the Supreme Court of Missouri ruled it could not entertain a bill in equity to enjoin collection of a tax. It said application had to be made to the State Tax Commission. In so doing, it overruled an earlier decision that the State Tax Commission could not entertain this very type of relief. This left plaintiff remediless at the date of the decision, because it was too late for it to file before the State Tax Board. Surprised by the decision, a petition for rehearing was filed asserting the constitutional right to a hearing before being deprived of property.

Appellants are in the same situation. Relying on *Blumenschein* v. *Pittsburgh Housing*, *supra*, we had every right to assume that the Supreme Court of Pennsylvania would remand to Common Pleas for trial.

In granting certiorari and reversing, this Court in Brinkerhoff said:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy, unless there is, or was afforded to him some real opportunity to protect it." (p. 682)

See also: *Missouri* v. *Gehner* (1930) 281 U.S. 313.

The right of Appellees, denied here by the Supreme Court of Pennsylvania, is their right to their day in

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[2] The other case cited by Appellees, *Ohio* v. *Akron Metropolitan Park Dist.*, 281 U.S. 74, that appellants have not timely asserted their Federal rights is an odd choice, inasmuch as this Court in that case assumed that the question was timely raised.

Court, to be heard by the Common Pleas Court of Pennsylvania before they and their property suffers from appellees' extravagant assessment.[3]

As S. A. de Smith, Britain's distinguished Administrative Law Scholar, points out:

> "English law recognizes but two principles of natural justice: that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and oppotunity to be heard (*audi alteram partem*)." Judicial Review of Administrative Action (1959) Stevens and Sons and Oceana Publications.

Appellants have never been heard. Appellees' Motion should be denied and the cause remanded for a hearing before the Common Pleas Court of Pennsylvania.

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[3] *Lambert* v. *California*, 355 U.S. 225, *Cheschro* v. *Los Angeles County Flood Control Dist.*, 306 U.S. 459.